Supreme Court, U.S.
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**In the**

**SUPREME COURT OF THE UNITED STATES**

October Term, 1994

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O. Howard Mummau, Petitioner

v.

Muriel J. Mummau, Respondent

---

On Petition for a Writ of Certiorari to the Superior Court of Pennsylvania

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# PETITION FOR A WRIT OF CERTIORARI

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162 pp

## QUESTION PRESENTED

Whether the trial court, in its conduct of proceedings and in its entry of a divorce order against an attorney, violated the Due Process provisions of the Fourteenth Amendment of the US Constitution, by refusing to recuse or to transfer the divorce case to another court where that attorney had run against the divorce court judge in his judicial election, that same judge was, during the pendency of the divorce proceeding, a defendant in a legal malpractice action in which the divorcing attorney represented the plaintiff, four other judges of the trial court were named as witnesses against the divorcing attorney in a civil suit stemming from his firing for his unendorsed judicial candidacy, and there were repeated ex parte meetings and further suggestions of improper relations between opposing counsel in the divorce action and several members of the trial court?

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**IN THE SUPREME COURT OF THE UNITED STATES**

October Term, 1994

---

O. HOWARD MUMMAU, Petitioner,

v.

MURIEL J. MUMMAU, Respondent.

---

O. Howard Mummau respectfully petitions for a writ of certiorari to review the judgment of the Superior Court of Pennsylvania. The Supreme Court of Pennsylvania denied Allowance of Appeal.

## OPINIONS BELOW

The order of the Supreme Court of Pennsylvania denying Petition For Allowance of Appeal, dated April 28, 1994 and order denying Application For Reconsideration, dated July 5,1994 [App.,infra, 13a, 12a] are unreported. The opinion and order of the Superior Court of Pennsylvania and Judgment, dated July 14, 1993, and denial of

Application for Reargument, dated September 23, 1993.[App.,infra, 2a- 11a] are reported at 635 A.2d 214. (Not published)

## JURISDICTION

The Supreme Court of Pennsylvania entered its judgment on July 5, 1994 denying Application For Reconsideration of its denial of Petition For Allowance of Appeal [App.,infra, 12a]. The jurisdiction of this Court is invoked under 28 U.S.C. Sect. 1257, as revised in the Act of June 27, 1988, 102 Stat. 662.

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### I. UNITED STATES CONSTITUTION,

Amendment 14, Section 1. provides, in relevant part "No state shall make or enforce any law which shall abridge the privileges and immunities of the citizens of the United States; nor shall any State

deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws." United States Code Service, Articles I-III, 1986 Edition

**II. 28 UNITED STATES CODE**, section 455 (a) provides: Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonable be questioned. 28 USCS, Section 455

**III. PENNSYLVANIA CONSTITUTION:** ARTICLE 5, section 17(b). "Justices and Judges shall not engage in any activity prohibited by law and shall not violate any Canon of Legal or Judicial Ethics prescribed by the Supreme Court". Purdons Pennsylvania Statutes Annotated, Constitution Articles 3 to End

**IV. PENNSYLVANIA CODE OF JUDICIAL CONDUCT:** CANON 3. A JUDGE SHOULD PERFORM THE DUTIES OF HIS OFFICE IMPARTIALLY AND DILIGENTLY

A. Adjudicative Responsibilities.

(4) a judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, must not consider ex parte communications concerning a pending proceeding.

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where;

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;...

(c) he knows that he, .... has a substantial financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the

outcome of the proceeding;

Pennsylvania Rules of Court

**V. PENNSYLVANIA RULES OF CIVIL PROCEDURE:** Rule 1006(d)(2). VENUE. CHANGE OF VENUE. Where, upon petition and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for reasons stated on the record, the court may order that the action be transferred. The order changing venue shall be certified forthwith to the Supreme Court, which shall designate the county to which the case is to be transferred. Pennsylvania Rules of Court

**VI. DOMESTIC RELATIONS CODE OF PENNSYLVANIA**, Section 3102 (A) (6). LEGISLATIVE FINDINGS AND INTENT.

(a) Policy.- The family is the basic unit in society and the protection and preservation of the family is of paramount concern. Therefore, it is the policy of the

Commonwealth to: (6) Effectuate economic justice between parties who are divorced or separated and...insure a fair and just determination and settlement of their property rights.

Section 3502. EQUITABLE DIVISION OF MARITAL PROPERTY. (A) GENERAL RULE.-....the court shall equitably divide, distribute or assign, in kind or otherwise, the marital property between the parties...after considering all relevant factors, including:

(3) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

(6) The sources of income of both parties, including but not limited to, medical, retirement, insurance or other benefits

(7) The contribution or dissipation of each party in the acquisition, preservation, depreciation or appreciation of the marital

property, including the contribution of a party as a homemaker.

(10) The economic circumstances of each party, including Federal, State and local tax ramifications, at the time the division of property is to become effective.

Section 3702. ALIMONY PENDENTE LITE, COUNSEL FEES AND EXPENSES. In proper cases, upon petition, the court may allow a spouse reasonable counsel fees and expenses. 23 Pennsylvania Consolidated Statutes Annotated, Section 1301 et seq.

**VII. INTERNAL REVENUE CODE:**

Section 1041. Transfers Between Spouses Incident to Divorce. No gain or loss is recognized with respect to transfers of property between spouses. Furthermore, there is no recognition of gain or loss relating to transfers of property made between former spouses, if the transfers are made incident to divorce. This rule applies both to direct transfers and transfers made

in trust for the benefit of a spouse. Internal Revenue Code of 1986, as amended

**STATEMENT**

Petitioner, O. Howard Mummau, is an attorney, who, in representing a client in February 1983, filed a legal malpractice suit naming the family court judge of Lancaster County, Pennsylvania (the trial court in this case) Wayne G. Hummer, Jr. a defendant. (Crumley vs. Hummer and Zimmerman, Lancaster County Court of Common Pleas, No. 39 of 1983) This malpractice action arose out of the Judge's failure to properly represent a former client, the father of two children, one of whom had been killed in an automobile accident and one who survived and was later adopted without his knowledge or consent while living with relatives under a temporary custody agreement. This adoption occurred while the father, the Judge's client, was hospitalized

for six months following a separate car accident in which he had suffered a permanent brain stem injury. During this period the Judge was representing the client to settle the decedent child's death claim and also to secure visitation rights with the surviving child who was living with relatives and had terminated the father access to visit his child. During the client's hospitalization, his parental rights were terminated and the child was adopted immediately thereafter. The client was not informed of the adoption, and the facts were concealed from the client until he retained Petitioner's representation several years later. A petition to set aside the adoption was filed by this Petitioner, and Judge Hummer was called to testify in that proceeding in Lebanon County, Pennsylvania in August 1982. (Douglas E. Crumley, Natural Father, Petitioner v. Galen Weaber and Patricia

Weaber, Adoptive Parents, Lebanon County Orphan's Court, No. 16, 1979)

After Mr. Crumley suffered disabling injuries from his auto accident, Judge Hummer, (at that a practicing attorney) and his law firm also represented Mr. Crumley in connection with his own personal injury claims. Unfortunately, through neglect, the law firm also missed a statute of limitations for the filing of litigation required to settle those claims.

Thereafter, Petitioner unsuccessfully attempted, through private communication with the Judge, to resolve the malpractice claims. After those efforts failed and the action was filed in February 1983, the Judge summoned Petitioner to his chambers to rebuke him for proceeding with the case. Several months later, Petitioner became involved in this divorce action.

Petitioner's divorce action was further complicated because he had also run against

Judge Hummer in 1979 for the judicial office to which he had been elected. Judge Hummer and all other judges on the local bench are Republicans. Petitioner had formerly been a Democrat, but registered as an independent and ran, party unendorsed, on both Democrat and Republican tickets in the primary election, as was the practice, as permitted under state law. During and following that primary judicial campaign, numerous recriminatory actions were taken against Petitioner, including public ridicule by members of the local judiciary and termination of his professional employment by the County of Lancaster and by the private law firm by whom he was employed. Several members of the local judiciary had spoken personally to Petitioner regarding their involvement in those terminations.

In July of 1983 Petitioner became a party to the divorce action in which this petition is filed.

Some months into the divorce action, Judge Hummer became involved in a judicial capacity. Before Judge Hummer conducted any hearings Petitioner had requested his recusal by oral motion, by formal petition and also later when represented by counsel by motion, on the record, of that counsel, James Clymer, Esq. That latter motion was met with an accusation by the Court that Petitioner had "brought proceedings against every member of the bench, save one". [App.infra.,at 70-71a] That attorney's representation of Petitioner was discontinued due to his concern for his own practice were he to continue as Petitioner's attorney, as he acknowledged in testimony subsequent to his discontinuance. [App. infra., at 58a] Judge Hummer refused recusal. Petitioner was never granted a hearing on the on his petition. By April 1984, in connection with litigation that had grown out of Petitioner's employment

"terminations", and in which there were allegations of judicial involvement, four judges of the trial court in addition to Judge Hummer were named as witnesses in the trial of that matter. Petitioner moved for a transfer of the divorce case to another jurisdiction. This was dismissed three days later by Judge Perezous without any hearing on the matter or opportunity to proceed to take depositions as provided under procedural rules. [App. infra.,at 59a-67a] (During the pendency of this case in the trial court, the divorce case of another attorney who was the president of the local bar association and a Republican was transferred to a judge of another county, sua sponte. Geisenberger v. Geisenberger, No. 3350 of 1984, Lancaster Court of Common Pleas)

It was later discovered that opposing counsel in this case had had an ex parte meeting with Judge Perezous just prior to

the entry of his order to a second similar motion again denying a transfer. That meeting had occurred after the Petitioner's motion was filed and just prior to the entry of Judge Perezous' order. That petition were also denied without any opportunity for a hearing.

**A. THE TRIAL COURT'S DENIAL OF DUE PROCESS**

The procedural history of the case in the trial court reveals a pattern of judicial conduct which denied Petitioner's fundamental right to due process, orchestrated through a secretive connection between the bench and opposing counsel in the case. That connection partially came to light (after Petitioner obtained the representation of Gerald E. Ruth, Esq. from York County, Pennsylvania) through the business records [App. infra., at 56-57a] of

opposing counsel, which she produced under subpoena, during her deposition in pursuance of a petition to have her disqualified as Respondent's counsel because of a conflict of representation that had arisen.

When opposing counsel, Greta R. Aul, first represented Respondent she was married to Kent Mikus, also an attorney, with whom she shared a practice. Within approximately a year, she and Mr. Mikus divorced, and their law partnership was dissolved. Attorney Aul then joined a law firm where she continues to practice, who Petitioner had consulted and who had agreed to represent him in the divorce. (Depositions indicated that opposing counsel may have been negotiating to join this firm during the same time that Petitioner had consulted with the firm concerning its representation of him.) Petitioner and his counsel discovered a number of ex parte communications and perhaps guidance from the

court to opposing counsel. (That favored relationship between Judge Hummer and opposing counsel was evident in open court when Judge Hummer went so far as to advise opposing counsel to object to evidence being offered by Petitioner. In a contempt proceeding against Petitioner, James Clymer, Esq., Petitioner's former attorney of record, was called by Petitioner to testify concerning discovery procedures with which Petitioner had allegedly failed to comply. Mr. Clymer was on the stand and was asked by Petitioner (Plaintiff below):

Q. Based on your own knowledge as an attorney would you say that the positions that I have taken or that have been taken by the Plaintiff [Petitioner herein] in this proceeding are based on a reasonable understanding -- [at this point the Court cut off Petitioner]

THE COURT: This travesty has to end, Mr. Mummau.

Do you have an objection, Ms. Aul? What are we doing here this afternoon, for heavens sake?

Mr. Clymer is an attorney, a member of the Bar. What is his opinion with reference to whether you positions have been correct or incorrect?

We are concerned today with if you have complied with the Court orders. Mr Clymer's opinion as to that is irrelevant.

MR. MUMMAU: Are you instructing me not ask him any more questions?

THE COURT: No. That question is not permitted.

MS. AUL: Your Honor, I will be happy to object to any further questioning of this witness, unless Mr. Mummau can indicate the relevance of the additional testimony. )

Despite the issuance of an advisory opinion, No. 87-20, [App. infra., at 93a by the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility

which held that an attorney in a representational conflict almost identical to that of opposing counsel was not permitted to continue representation, Judge Hummer refused to disqualify opposing counsel. Petitioner took an immediate appeal from that order in the form of a Petition for Review to the Superior Court in which appeal he attempted to also raise the issue of judicial recusal. That appeal was held to be interlocutory and quashed. [App. infra.at 74a-75a]

The trial court largely abandoned procedural rules under state law intended to insure procedural due process. Through its process the trial court attempted to render Petitioner defenseless against the claims and procedural advantages given Respondent's counsel. The trial court became accusatory of Petitioner and repeatedly attempted to humiliate him in the courtroom. [App.infra., at 82a-92a] At one point Judge Hummer

called the parties to his chambers without the presence of a court reporter. Off the record the Judge acknowledged that Petitioner's objections to the procedure's the court was employing were legitimate. Petitioner then filed an affidavit of that meeting, which the Court repudiated in angry terms at the next proceeding. [App.infra.,at 82a-89a] Petitioner was singularly subjected to unlawful body searches in the judges courtroom and the public was prohibited. [App.infra., at 68a]

Some additional examples of the judicial procedural leveraging include: The Pennsylvania Divorce Code provides for bifurcation of divorce from property claims to promote the purpose of the Divorce Code that parties can begin to rebuild their lives even if property issues may require additional time. In this case both parties filed consents to have the court enter a divorce decree within six months of the

filing of the action. Because there were property issues that were not readily resolved, Petitioner filed a petition for bifurcation, to which opposing counsel objected. Such a petition ordinarily results in a hearing to determine if there is any prejudice to granting bifurcation. But in this case the court issued a summary order dismissing the petition and never afforded a hearing. Now, more than eleven years after the divorce action was filed, the parties are still technically not divorced because where no bifurcation was granted the divorce and property issues retain a unity and can only be final as a unit. Petitioner has been unable to remarry or in other important ways to rebuild his life.

Shortly after the action was filed, (August 1983) Judge Mueller, who retired shortly thereafter, entered an order requiring that rental income from marital

property be deposited into a joint account and be used to maintain and pay expenses associated with the marital real estate which Petitioner continued to occupy. But Respondent would not comply with the order and refused to permit use of marital funds as ordered. When Petitioner, after several years, attempted to have the court address this issue, it refused and instead incarcerated Petitioner for contempt because a check Petitioner had written to the domestic relations office in payment of alimony pendente lite was returned for insufficient funds after funds had been removed from petitioner's bank account pursuant to a temporary injunctive court order obtained ex parte by opposing counsel without notice to petitioner, on the grounds that they were marital, and without any notice to Petitioner. Under Pennsylvania provisions such a temporary order remains effective for only five (5) days without a

hearing.1 But there was never a hearing and that temporary order has become effectively "permanent" because the funds removed from Petitioner's bank account were never returned.

Judge Hummer held Petitioner in contempt for failing to answer interrogatories in the divorce proceeding which had never been served or endorsed by any counsel of record. The Judge took this action and imposed sanctions against Petitioner at a hearing of which Petitioner

1.Pennsylvania Rule of Civil Procedure 1531 (d) provides: An injunction granted without notice to the defendant shall be deemed dissolved unless a hearing on the continuance of the injunction is held within five (5) days after the granting of the injunction or within five (5) days after the granting of the injunction or within some other time as the parties may agree ow as the court upon cause shown shall direct.

had been given no notice. Petitioner attempted to challenge that order as entered in violation of due process, but Judge Hummer would not even permit consideration of the issue. [App. infra., at 69a-70a] (Petitioner then took an immediate appeal to the Superior Court from that order, but the Order was held to be interlocutory and not then reviewable.) [App. infra., at 74a-75a] Those sanctions prohibited Petitioner, inter alia, from offering any evidence at the divorce trial of the value of marital property. [App. infra., at 76a-79a] None the less, Judge Hummer repeatedly denied Petitioner the right to have any inventory or appraisal of any of the furniture, furnishings and antiques of the marital home which Respondent had precipitously removed when she had separated in June, 1983. [App. infra.,at 90a]

The trial court not only abrogated Petitioner's fundamental right to due

process in manipulating procedures under its direct control, but further, it repudiated the due process afforded by a Special Master who actually conducted several days of hearings on equitable distribution of marital property. This Master was an experienced attorney appointed to hear the testimony of all witnesses and to make findings and recommendations to the court regarding the distribution of the parties' marital property.

The Master was impartial. This case was his last before retirement from his office. He apparently recognized the injustice of the Court's actions and, over the objection of opposing counsel, permitted Petitioner's evidence as to the value of marital property.

His recommendations were considered and fair . But opposing counsel took opposition to them knowing she could succeed in getting the case again before Judge Hummer who, she

claims, "owes her". (Quoting opposing counsel as stated to Judge Hummer in open court on January 20, 1993.)[ App. infra., at 47a-49a]

**B. THE TRIAL COURT'S FINAL ORDER**

**[ App. infra., at 14a-41a]**

Judge Hummer rejected the recommendations of the Master and ordered a distribution which, in important respects, violates numerous recognized authoritative Pennsylvania appellate court precedents in equitable distribution cases as well as specific statutory provisions of the Pennsylvania Domestic Relations Code. These violations have resulted in depriving Petitioner of a substantial percentage of the marital estate and in converting Petitioner's property, which is solely his and acquired after separation, and by failing to credit Petitioner with his expenses of maintaining marital property

over a period of more than ten years; by improperly applying marital property to pay rent to Respondent and fees to her attorney, and by depriving Petitioner of the right to acquire Respondent's interest in the marital residence - a residence that was uncompleted when Petitioner acquired it at a sheriff sale in 1978, which he completed with his own labors, has occupied for over sixteen years, more than eleven of which have been since separation with the parties' son following the 1983 separation of Respondent. Judge Hummer's order failed, as mandated under state statute, to consider tax consequences of his scheme of distribution, despite the fact that those tax consequences (as opposed to the consequences of the Master's recommendations as evidenced by expert tax opinion testimony) will result in substantial capital gains tax liabilities and a depletion of the marital estate. The trial court's order is also in conflict with

federal tax law because it orders Petitioner to pay the income tax liabilities attributable to capital gains to be received by Respondent, which, under federal tax law, are payable by her.

The trial court's disposition of the marital estate, and in ordering the sale of Petitioner's residence, repudiated the due process afforded by the Special Master.

Judge Hummer's opinion fails to even mention evidence offered by Petitioner's expert witnesses and medical testimony that was presented at that Master's hearing. On the other hand, the Court made "findings" that were not supported by any evidence whatsoever, but which "justified" his "result". An example of this is his conclusion that the parties' enjoyed an "upper class standard of living", [App. infra., at 23a-24a] In the last five years of their marriage, which included their highest incomes, the parties' joint incomes

averaged less than $24,000, and for their entire marriage, less than $19,000/yr.) And, the Judge's conclusion that Petitioner could be a "teacher of theology" is a mere abstraction from the fact that Petitioner earned a seminary degree prior to attending law school.

The Judge credits Respondent with Petitioner's education and never acknowledges that Petitioner had been employed during most of his continued educaticn during the period of marriage and that his graduate law degree was pursued and completed after separation.

Judge Hummer's scheme of distribution in expanding the Respondent's share of the marital estate and ordering Petitioner to pay her attorney fees is grounded on a conclusion that Respondent was unable to be gainfully employed other than as a waitress and was thus unable to support herself.

Nevertheless, Respondent is a

registered nurse who had a professional career in nursing for more than fifteen years, until she separated from Petitioner, when she began working as a waitress. She had only applied for one nursing position, and the court ignored the expert testimony of a nursing administrator who testified that Respondent's nursing opportunities were limited only by her own failure to seek employment.

On the other hand the Judge accused Petitioner being underemployed and totally ignored the devastation to his career which had resulted from the political recriminations he suffered after the 1979 judicial race. The court completely ignored the testimony of Petitioner concerning his sustained efforts to find better employment in his profession, and ignored even the expert testimony offered by Respondent's own legal witness concerning the earning capacity of an attorney in Lancaster County

engaged in a solo practice.

While the Court found that Petitioner had substantially greater earning capacity than Respondent and should thus receive less of the marital estate, pay her attorney fees, and rent since 1984, that same greater earning capacity did not entitle Petitioner to an opportunity to purchase the marital residence because the Judge "could not guarantee" that Petitioner could do it, even though he acknowledged that he should be able to. An unbiased judge would have provided Petitioner the opportunity to purchase the residence, rather than resolving any ambiguity against him.

Judge Hummer has acknowledged in open court that he may be biased against Petitioner. He has repeatedly become embroiled and accusatory with Petitioner, and held Petitioner in contempt for attempting to secure his right to procedural due process. Opposing counsel has reminded

the Judge that he "owes her" in this case. Petitioner had questioned the court and opposing counsel on the record concerning these remarks, but when Petitioner attempted to obtain the court transcript containing this colloquy, Petitioner was advised that the Judge had ordered the court reporter not to make the transcript available to Petitioner. [App.infra., p.51a-55a]

The question presented is whether under these circumstances the trial court's failure and refusal to recuse or to transfer Petitioner's divorce case to judges of another jurisdiction violates the Due Process provisions of the Fourteenth Amendment. See Tumy v. Ohio, 273 U.S. 510 47 S.Ct. 437, 71 L.Ed. 749 (1927); Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d. 267(1972); Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); In re

Murchison, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955).

**C. PROCEEDINGS IN THE STATE APPELLATE COURTS**

Petitioner took an appeal to the Pennsylvania Superior Court. A three judge panel wrote an opinion [App. infra., at 2a-10a] affirming the trial court's refusal to recuse or to grant a change of venue. It found that the record documents to not support Petitioner's assertions supporting recusal and that the record lacked certain documents. Indeed, the Superior Court opinion includes a footnote reference to a Rule of Pennsylvania Civil Procedure indicating that a decision on a Petition for a change of venue is to follow a hearing on the Petition. [App.infra., p.7a]. But the Superior Court does not acknowledge that the trial court had denied Petitioner the opportunity for the requisite hearing at

which a full and complete record might have been made.

The Superior Court fails to address a number of the procedural issues that were raised and briefed including the disqualification of opposing counsel and the order of contempt and sanctions entered against Petitioner without notice. The Superior Court fails to apply a standard of review that is consistent with the 14th Amendment guarantee of the fundamental right to due process as articulated by this Honorable Court.

The Superior Court failed to accurately reference the materials in the record which quite clearly indicate the reasons why Judge Hummer should have recused himself and why this case should have been transferred to a judge of another jurisdiction, which included, for example the transcript of a court proceeding in Lebanon County in 1982 at which Judge Hummer had testified, upon

being called by Petitioner, to his own dereliction of responsibility to his former client. That conduct was one of several grounds for the malpractice action which was pending at the time this divorce action began.

The Superior Court failed to consider the language of the Pennsylvania Code of Judicial Conduct, Canon 3 C (1) whose language is patterned after the American Bar Association's Code of Judicial Conduct and provides that "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(c) he knows that he, individually... has a substantial financial interest in the subject matter in controversy or in a party

to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

The Superior Court failed to consider the provisions of the Pennsylvania Constitution: Article 5, Section 17(b), "Justices and Judges shall not engage in any activity prohibited by law and shall not violate any Canon of Legal or Judicial Ethics prescribed by the Supreme Court". (From Purdons Pennsylvania Statutes Annotated, Constitutional Articles 3 to end, P. 270)

The Superior Court's analysis is, unfortunate, largely a protective gloss over a trial court which had a variety of interests in the litigation.

Petitioner filed application for reargument before the entire Superior Court of Pennsylvania which was denied. [App.infra., at 11a] Thereafter, Petitioner's Application for Allowance of

Appeal to the Pennsylvania Supreme Court was denied as was also his Application for Reconsideration to the Pennsylvania Supreme Court.

Petitioner properly raised the Constitutional Due Process issues in the trial court and raised and briefed those issues in both the Superior Court and Supreme Courts of Pennsylvania. [App. infra., p.72a-73a].

**REASONS FOR GRANTING THE PETITION**

The conduct of the trial court violated Petitioner's 14th Amendment Due Process rights as explicated in numerous decisions of this Supreme Court. The opinion of the Superior Court of Pennsylvania fails to apply the constitutional standards of due process required under the 14th Amendment. In that the Supreme Court of Pennsylvania denied Petitioner's Application for Allowance of Appeal, Petitioner is dependent

upon this Court to provide a just remedy and to preserve his right to fundamental due process under the United States Constitution, consistent with other decisions of this Court.

**I. THE TRIAL COURT JUDGES HAD AN INTEREST IN THE LITIGATION.**

The Code of Judicial Conduct of Pennsylvania, provides at Canon 3 C(1) Disqualification. A judge should disqualify himself in a proceeding in which his partiality might reasonably be questioned, including but not limited to instances where: (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; and ...(c), he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a substantial financial interest in the subject matter in controversy or in a party to the proceeding,

or any other interest that could be affected by the outcome of the proceeding; (Pennsylvania Rules of Court)

The trial court in this case had interests that were other than pecuniary as well as interests that were direct and pecuniary. A reasonable person knowing all the facts would believe that the trial court was interested in this litigation, and the process and result are persuasive that the court acted, based upon its interests, such as to lead the trial court "not to hold the balance nice, clear and true". Aetna, 475 US, at 825, 89 L Ed 2d 835, 106 S Ct 1580 (1986) (quoting Tumy v Ohio, 273 US 510, at 532 (1927)

That interest, at least, was to respond to assertions of professional dereliction and improper political conduct which included various members of the trial court. The assertions were an unfamiliar response to the all too familiar presence of an

insidious "majoritarianism" that was more concerned with control than with the constitution or the rights of a disabled father who had apparently been forgotten for an insurance death claim.

Judge Hummer had an interest in this litigation because his professional embarrassment had been exposed by Petitioner's actions in representing the Judge's former client and in attempting to undo some of the effects of his malpractice and, as necessary, to obtain a remedy against the judge himself. The judge had an interest in seeking to dissuade Petitioner from continuing that malpractice litigation, and he was in a position to try to persuade, coerce or even punish Petitioner. It may be said that Judge Hummer had a rather direct financial interest in the litigation to the extent that his malpractice exposure can be understood as being related to the pressure that could be

and was brought to bear upon Petitioner by the court's procedural powers in managing his divorce case. That power was understood by not only Petitioner but by other attorneys as well. Attorney Clymer was fearful to continue to represent Petitioner for this reason.

Eventually Petitioner recognized that he could not continue to represent the malpractice client because of the court's conduct towards him. He secured the counsel of another attorney for that purpose but only with difficulty as indicated in his deposition. [App. infra., p 94a-96a]

The other judges who were named as witnesses against Petitioner in other litigation resulting from his political "firing" after he had challenged the Republican judicial engine in 1979 also had an interest in this litigation. Some of them had potential financial interests because they also had been named, although

not sued in that action, as having been involved in the retaliation that Petitioner had encountered. Moreover, had the trial court granted hearing on Petitioner's motion for a change of venue as required under procedural rule, a record would have been made, and that record would only have further expanded the information alleged in the petition and would have afforded greater visibility to the circumstances of judicial misconduct. Where a transfer of venue is granted, the trial court is required to notify the state Supreme Court which could have brought allegations of judicial misconduct directly to the attention of the Supreme Court. The trial court thus had an interest in Petitioner's divorce litigation.

Finally, the relationship of opposing counsel with various members of the court, including Judge Hummer, as evidenced by her numerous ex parte contacts and by her own statements that Judge Hummer "owed her",

raise strong implications of yet other interests, although their precise nature is unknown.

**II. THE SUPERIOR COURT'S "ABUSE OF DISCRETION" STANDARD OF REVIEW OF JUDICIAL RECUSAL.**

Despite a direct, personal and pecuniary interest of two judges who participated in the decision that was under challenge in Goodheart v. Casey, 523 Pa.188, 565 A.2d. 757 (1989) the Pennsylvania Supreme Court found that this Court's holding in Aetna Life Ins. Co. v. Lavoie, supra. did not require disqualification of the two jurists because their votes were "surplusage". Furthermore, the Appellants in Goodheart supra had also challenged the two "interested" jurists on the ground that they had violated the state Judicial Code of Conduct at Canon 3(C): (1) a judge should disqualify himself in a proceeding in which

his impartiality might reasonably be questioned,...". The Pennsylvania Supreme Court, in responding to this challenge in Goodheart wrote: "Under our (Pennsylvania) law, a strong tradition has been established which recognizes that each judge has the primary responsibility for determining the validity to a challenge to his or her participation in a given matter....This view rests upon the sound premise that the jurist requested to recuse himself is the most capable to determine those factors hidden in the recesses of the mind and soul which would bear upon his or her capability to maintain the impartiality that each matter must receive. That exercise of conscience was intended to be aided by Canon 3(C) which provides some of the factors bearing upon such evaluation. The decision of the judge is final, subject to review only for an abuse of discretion." Goodhardt, Supra at 199-200.

An analysis of this standard, as exemplified by the within Petition, discloses the potential for abuse which it entails. The Pennsylvania Supreme Court reaffirms a standard for disqualification which is "subjective" and based upon what is "hidden in the recesses of the mind and soul... [of the jurist]". Even as that which is the basis upon which a jurist would thus decide whether or not to recuse is "hidden", so also is that by which any appellate court can review a judge's decision not to recuse.

The practical effect of this subjective standard is that there is no rational basis by which an appellate court can review a trial court's decision not to recuse. No one can make a determination as to whether there has been an "abuse of discretion" when those factors bearing upon the question of disqualification are "hidden in the recesses of the mind and soul" of someone else.

Despite the standard reaffirmed by the Pennsylvania Supreme Court in Goodheart, supra., the language of the Pennsylvania Code of Judicial Conduct is indeed the language of an objective, not a subjective, test for disqualification. It is similar to the language of Section 455 of the United States Code providing for disqualification of the federal judiciary. Chief Justice Rehnquist, albeit in a dissenting opinion, in Liljeberg v Health Services Corp. 486 US 847, 108 S Ct 2194 at 100 L Ed 2d 855 (1988) discussed the revision that Congress enacted in 1974 to change Section 455 to conform to the recently adopted Canon 3C of the American Bar Association's Code of Judicial Conduct. Justice Rhenquist wrote that "Subsection (a) was drafted to replace the subjective standard of the old disqualification statute with an objective test." Id. at 486 U.S. 847, 870, 100 L.Ed. 2d 855, 878, 108 S.Ct. 2194 (1988)

In Liljeberg, this court held by a narrow majority that under Section 455 (a), disqualification of a federal judge was required-even though the judge lacked actual knowledge of facts indicating the judge's impartiality might be questioned- where a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge. In that case, the court found that due to a lapse of memory, the judge did not have actual knowledge.

The test for disqualification in Liljeberge, with which both majority and dissenting opinions agree, is an objective test. The test is not what a judge himself believes concerning whether he may be biased or impartial in a proceeding. It is whether a reasonable person, knowing all the facts and circumstances which a judge either knows or should know, would cause that person to conclude that a judge's impartiality in a

proceeding might be questioned. The judge's personal belief or opinion on the matter is irrelevant.

**III. THE PENNSYLVANIA SUPREME COURT CONTINUES A TEST FOR RECUSAL INCONSISTENT WITH THE STANDARDS OF DUE PROCESS.**

It is acknowledged that construction of a federal statute is not at issue here. It is also acknowledged that this court has indicated that the standard for recusal may be higher under state law or federal statute than that required under the Fourteenth Amendment Due Process Clause. "The Due Process Clause demarks only the outer boundaries of judicial disqualifications." Aetna, supra, at 475 U.S. 813, 828, 89 L.Ed. 823, 837, 106 S.Ct. 1580 (1986) However, the standard for recusal, even in a state court, may never be lower than that required under the Fourteenth Amendment Due Process Clause.

It is clear that the standard for disqualification under section 455 (a) of the United States Code requires an objective test of disqualification, and it thereby provides for an effective review of any recusal decision of a federal judge. The only difference between the language of the federal statute and the Pennsylvania Code of Judicial Conduct is found in the use of the word "should" in the Pennsylvania Rule and the word "shall" in the federal statute. Chief Judge Rogers, in his opinion in Scott vs US, 559 A.2d 745 (1989) makes a careful study of distinction between the "should" language of the American Bar Association's Code of Judicial Conduct (the language of the Pennsylvania Code) and the federal statute. He concludes in footnote 8 that the "'semantic' difference is without legal significance." Id. at 749.

The Pennsylvania Superior Court, in its opinion in this case, also addresses the

issue of the time when Petitioner requested recusal. Petitioner had clearly raised the issue within a few months of the divorce action having been brought. It was raised early after he became aware that Judge Hummer had any involvement in the case and prior to the judge conducting any hearings. It was more than eight years prior to the judge's final order. Moreover the petition requesting a change of venue was filed as soon as four other judges were named as witnesses against Petitioner in another case. That was more than eight years prior to the final order in the trial court. The Supreme Court in Goodheart, supra, had also addressed the issue of the timing of the request for disqualification.

Petitioner respectfully suggests that the Canon of Judicial Conduct places the burden for recusal upon a judge, himself, in those situations where the facts are already known to him, as they clearly were in this

case. No litigant should have the burden of assuring that a judge in his or her case is in compliance with the Code of Judicial Conduct. A judge takes an oath to his high office, and he has the responsibility, when he is aware of the relevant facts, to remove himself when his impartiality might reasonably be questioned.

The Pennsylvania Court has a continued to reaffirm a test of disqualification that should be changed in two important respects: (1) the test for disqualification should be an objective, not a subjective test, and (2) the burden of disqualification should be on the court where the facts are known to the court and not on litigants.

**IV. THE ISSUES PRESENTED IN THIS PETITION ARE IMPORTANT TO THE ADMINISTRATION OF JUSTICE.**

Justice Scalia has observed that "[N]othing is more wasteful than litigation

about where to litigate." Bowen v. Massachusetts, 487 U.S. at 930 (dissenting opinion); see also Christianson v. Colt Industries Operating Corp., 486 U.S. 800, 818-19 (1988). This case presents a tragic example of the wastefulness of a litigant seeking a fair and impartial judiciary, the most fundamental issue of "where to litigate".

Pennsylvania courts are administered by a "unified court system". The Supreme Court of Pennsylvania creates the rules by which justice is administered throughout the Commonwealth.

It is not difficult to find lofty tributes to the importance of protecting public confidence in the integrity of judges since "[a]n independent and honorable judiciary is an indispensable condition of justice in our society". Scott v. U.S., supra (quoting from "Judicial Disqualification: Hearings on S.1064 Before

the Subcomm. on Improvements in Judicial Machinery of the Senate Comm. on the Judiciary, 93rd Cong. 1st Sess. 80(1973))

But justice is not achieved by mere reference to lofty phrases. It is only pursued, case by case, as judges are singularly dedicated to detached and disinterested impartiality to the litigants and attorneys involved in those cases and committed to the highest principles of the law.

Perhaps it is ironic, that, even as this petition is being prepared, the Chief Justice of the Pennsylvania Supreme Court has been removed from the Court and is defending an impeachment trial in the Pennsylvania Senate amid charges and countercharges within that Court including listkeeping of attorneys to be favored and of improper contacts with trial court judges concerning appellate cases, etc.. It is hardly an occasion for confidence among

litigants in this Commonwealth that their right are secured in the hands of judiciary committed to the high ideals of our legal tradition.

This Honorable Court can enhance the quality of justice in Pennsylvania and for litigants in all state courts by clarifying the disqualification test under the 14th Amendment Due Process Clause. That constitutional test should be no less objective for a state court judge under the American Bar Association Code of Judicial Conduct than it is for a federal judge under Section 455 (a) of the United States Code.

This Court should state clearly that a litigant in a state court has a right under the 14th Amendment Due Process Clause to expect a judge to disqualify himself in a case when he knows or should know of facts and circumstances which would lead other persons to reasonably question his impartiality. This Court should state that

the test is, as under Section 455(a) of the United States Code, an objective test. It is not the test of the Supreme Court of Pennsylvania - based upon "those factors hidden away in the mind and soul of the judge..." which no other person else is able to know and no other judge is able to effectively review, as articulated by the Pennsylvania Supreme Court and applied in this case by the Superior Court.

## CONCLUSION

The granting of this petition is most important to Petitioner, but it has implications for many other litigants. Due process for one means better justice for all. When a litigant suffers the consequences of a biased judiciary, it matters not whether it is in state or federal court.

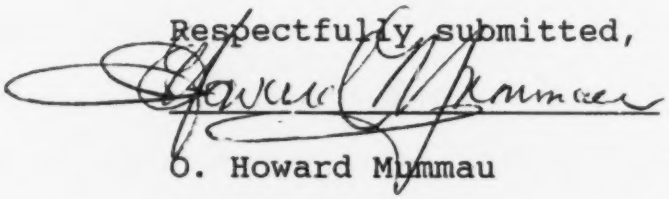
State court judges should be no less immune from an objective standard of

disqualification than are federal judges. The purpose of the requirement of disqualification in both instances is to assure both the fact and the appearance of impartiality.

Petitioner has been caught in a web of errors which their makers have been unable to see because they are looking into the darkness of their own "hidden recesses".

This Court should grant this Petition for a writ of certiorari and turn their eyes upward to their ideals lighted by the reason of others.

Respectfully submitted,



O. Howard Mummau
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1130 Penn Grant Road
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(717)687-0743

# A P P E N D I X

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| **J. A20049/1993** | **: IN THE SUPERIOR** |
| **O. HOWARD MUMMAU,** | **: COURT OF** |
| **Appellant:** | **PENNSYLVANIA** |
| **v.** | **: NO. 03696 PHL 92** |
| **MURIEL J. MUMMAU** | **:** |

**Appeal from the Decree of October 30, 1992 in the Court of Common Pleas of Lancaster County, Civil Division, at No. 182, July Term 1983.**

**BEFORE: DEL SOLE, HUDOCK, AND HOFFMAN, JJ.**

**MEMORANDUM:**

Appellant O. Howard Mummau appeals from the decree in divorce entered October 30, 1982 which incorporates the order of September 24, 1991 for equitable distribution of the parties' marital property. Appellant contends that the trial court erred in refusing to recuse himself and assign a judge of another jurisdiction to the case and that the court abused its discretion in setting aside the

master's recommendation for equitable distribution. For the reasons that follow we affirm.

Appellant, O. Howard Mummau, and appellee, Muriel J. Mummau, were married on August 29, 1965 and separated on or about June 5, 1983. On July 18, 1983, appellant filed a complaint in divorce under sect 201(c) of the Divorce Code. Thereafter, appellee filed a complaint in divorce under sect 210 (a)(6) and 201 (c) in which she requested equitable distribution, support, alimony pendente lite, alimony, and counsel fees. The two actions were consolidated and the parties filed affidavits of consent pursuant to sect 201(c). A divorce master held hearings on April 8, 1987, October 19, 1988 and November 7, 1988 and filed his report and recommendation on May 5, 1990. The master recommended, inter alia, an equal distribution of the marital property between the parties. Appellee filed exceptions to the master's recommendation.

The trial court determined that the master had erred in recommending a fifty/fifty division without considering the factors set forth in sect 3502(a) of the Divorce Code. The court then concluded that a forty-five/fifty-five distribution in favor of appellee was more appropriate. Appellant appeals from that decision.

Appellant first contends that Judge Hummer, the trial judge, erred in failing to recuse himself. Specifically, he asserts that Judge Hummer was biased because of animosity that arose during a judicial election in 1979 in which Judge Hummer was the endorsed candidate and appellant ran against him as an unendorsed candidate. In addition, appellant refers to a legal malpractice action in which appellant represented the plaintiff against Judge Hummer who had been the party's attorney. We find no abuse of discretion in Judge Hummer's failure to recuse himself.

"A party to an action has the right to

request the recusal of a jurist where that party has reason to question the impartiality of the jurist in the case before the Court." Ware v. U.S. Fidelity & Guar. Co., 395 Pa. Super. 501, 505, 577 A.2d 9902, 904 (1990) (quoting Goodheart v. Casey, 523 Pa. 188, 198, 565 A.2d 757, 762 (1989). "A party seeking recusal or disqualification must 'raise the objection at the earliest possible moment, or that party will suffer the consequence of being time barred.'" (quoting Goodheart at 199, 565 A.2d at 763). To succeed in a motion to recuse, the 'charges of judicial partiality must be set forth with specificity and supported by evidence establishing bias, prejudice or unfairness necessitating recusal." Id. (citing Feingold v. Hill, 360 Pa. Super. at 551,521 A.2d at 39-40). A trial judge's decision not to recuse himself will not be disturbed absent an abuse of discretion. Reilly v. SEPTA, 507 Pa 204, 489 A.2d 1291 (1985).

In the instant case, appellant points to several documents in the reproduced record in support of his assertions that the trial judge was prejudicially influenced by prior interactions between appellant and the judge. However, appellant entirely fails to substantiate his claims. Several of the documents appellant refers us to do not support his assertion at all and are often of no relevance to the issue at hand. Other documents are not included in the original record. Thus, appellant has failed to support his charge with sufficient evidence of bias, prejudice or unfairness.

Additionally, the election to which appellant refers took place in 1979, four years before he filed his complaint in divorce. Moreover, appellant did not seek a change of venue or recusal or Judge Hummer until ten months after appellant initiated the divorce action. In the interim, several motions pertaining to the divorce action were

decided by Judge Hummer.

Appellant's allegation that the trial court abused its discretion in refusing to grant a change of venue or to appoint a judge from another jurisdiction is equally meritless.1 A decision on a petition for a change of venue is within the trial court's discretion.1

Dranzo v. Winterhalter, 395 Pa. Super. 578, 587, 577 A.2d 1349, 1353 (1990) (citation omitted), appeal denied, 526 Pa. 648, 585 A.2d 468 (1991). "A change of venue is not granted lightly or without real necessity, and the applicant bears the burden of proving that the change of venue is necessary." Id. (citation omitted).

1. Pa.R.Civ.P. 1006(d)(2) provides:

Where, upon petition and hearing thereon, the court finds that a fair and impartial trial cannot be held in the county for reasons stated of record, the court may order that the action be transferred.... Pa.R. Civ.P. 10)

Appellant's unsuccessful efforts as a judicial candidate also form the basis of appellant's petition for change of venue. He asserts that as a result of his loss, he was terminated from a job at a law firm. He subsequently brought suit against the law firm. According to appellant, the firm's proposed witnesses included four judges in Lancaster County, other than Judge Hummer. As a result, appellant asserts that a change of venue should have been granted or a judge of another jurisdiction should have been brought to hear his divorce case because the judges from Lancaster County were somehow biased. However, appellant does not indicate that these judges did in fact testify against him and he otherwise fails to substantiate his claims. Thus, we fail to see how these judges were somehow prejudiced against appellant. Accordingly we find that the trial court did not abuse its discretion in denying the petition for change of venue.

Appellant next contends that the trial court abused its discretion in setting aside the master's recommendation of property distribution. We utilize an abuse of discretion standard of review in determining the propriety of the trial court's distribution of marital property in a divorce matter. King v. King, 332 Pa. super. 526, 529, 481 A.2d 913, 914 (1984). After thoroughly reviewing the record and the parties' briefs, we find that the trial court has properly resolved this issue in its opinion. We therefore affirm for the reasons stated therein.

Affirmed.

J. A20049/1993

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| O. HOWARD MUMMAU, | : | IN THE SUPERIOR |
| APPELLANT | : | COURT OF |
| V. | : | PENNSYLVANIA |
| MURIEL J. MUMMAU | : | NO. 03696 PHL |

Appeal from the Decree of October 30,1992 in the Court of Common Pleas of Lancaster County, Civil Division, at No. 182, July Term 1983.

**J U D G M E N T**

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgement of the Court of Common Pleas of Lancaster County be, and the same is hereby Affirmed.

By The Court:
David A. Szewczak,
Prothonotary

Dated: July 14, 1993.

J. A20049/93

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| O. HOWARD MUMMAU, | : | IN THE SUPERIOR |
| APPELLANT | : | COURT OF |
| V. | : | PENNSYLVANIA |
| MURIEL J. MUMMAU | : | NO. 03696 PHL |
| | : | 1992 |

**O R D E R**

The court hereby denies the application filed July 27, 1993, requesting reargument/reconsideration of the decision dated July 14, 1993.

PER CURIAM

DATE: September 23, 1993

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

| | | |
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| O. HOWARD MUMMAU, | : | No. 465 Middle District |
| Petitioner | : | Petition for Allowance |
| v. | : | of Appeal from Superior |
| MURIEL J. MUMMAU, | : | Court |
| Respondent | : | |

O R D E R

PER CURIAM:

AND NOW, this 5th day of July, 1994, the Application for Reconsideration is hereby denied.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1801, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993

IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

| | | |
|---|---|---|
| O. HOWARD MUMMAU, | : | No. 465 Middle District |
| Petitioner | : | Allocatur Docket 1993 |
| v. | | |
| MURIEL J. MUMMAU, | : | Petition for Allowance |
| Respondent | : | of Appeal from Superior |
| | : | Court |

**O R D E R**

**PER CURIAM:**

AND NOW, this 28th day of April 1994, the Petition for Allowance of Appeal is hereby denied.

Mr. Justice Frank J. Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Rolf Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

**IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA - CIVIL ACTION - LAW**

**O. HOWARD MUMMAU :**

**vs. : NO. 182,**

**MURIEL J. MUMMAU : JULY TERM, 1983**

**OPINION**

**By Hummer, J.**

The Plaintiff, O. Howard Mummau (hereinafter referred to as "Husband"), and the Defendant, Muriel J. Mummau (hereinafter referred to as "Wife"), were married on August 29, 1965 in Lancaster County, Pennsylvania and separated on or about June 5, 1983. The parties are the parents of one child, Lowell P. Mummau, born January 28, 1966, who is emancipated.

On July 18, 1983, Husband filed a Complaint In Divorce under Sect 201(c) of the Divorce Code (now Sect 3301(c)). Thereafter, wife filed a Complaint in Divorce under sect 201 (a)(6) and 201(c) (now Sect 3301(a)(6) and Sect 3301(c) respectively) in which she

requested equitable distribution; support; alimony pendente lite; alimony; counsel fees, costs and expenses. The second Complaint was consolidated with the first action and treated as an Answer and New Matter. On December 8, 1983, both parties filed Affidavits of Consent under Sect 201(c) of the Divorce Code (now sect 3301(c)).

On december 28, 1984, the Court appointed a Divorce Master in this matter. Accordingly, the Master held hearings on April 8, 1987; October 19, 1988 and November 7, 1988. On May 5, 1990, the Master filed his Report and Recommendation. By the time of the Divorce Master's hearings, both parties had agreed that there would be no alimony. Furthermore, in his Report, the Master concluded that all of the parties' personal property, including any motor vehicles as well as any life insurance policies, had been divided to the satisfaction of the parties. The Master recommended that the remaining marital

property be divided on an equal basis in the following manner:

**TO HUSBAND:**

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|---|---|
| 1. 1130 Penn Grant Rd. | $195,000. |
| less $45,000 to wife | -45,000. |
| **TOTAL TO HUSBAND** | $150,000. |

**TO WIFE:**

| | |
|---|---|
| 1. Cash due from Husband | $45,000. |
| 2. Joint checking account | 31,000. |
| 3. Husband's IRA | 20,000. |
| 4. Wife's IRA | 11,000. |
| 5. Municipal Bonds | 21,400. |
| 6. Certificate of Deposit | 17,000. |
| 7. West Donegal property | 1,500. |
| 8. Interest Income | 2,800. |
| 9. Delaware Reserve | 300. |
| **TOTAL TO WIFE** | $150,000. |

The Master recommended that Husband be allowed to pay the $45,000 to Wife in one of the following two ways: (1) Husband could give Wife a mortgage on 1130 Penn Grant Road in the amount of $45,000 for a period of 10 years at

12% interest with a monthly payment of $645, or (2) Husband could refinance 1130 Penn Grant Road and pay Wife the $45,000 at that time. Furthermore, the Master recommended that each party pay their own attorney fees and expenses.

Wife has filed timely exceptions to the Master's report and recommendation, which are currently before the Court.

**Discussion**

1. **Percentage Distribution**

The Master in this report and recommendation recommends that the marital property be distributed between the parties on an equal basis. However, in so doing, the Master fails to enlighten the Court as to his reasoning on this particular recommendation. Clearly, "[a] Master's Report is entitled to great consideration". Morschhauser v. Morschhauser, 357 Pa. Super. 339, 516 A.2d. 10, 15 (1986). However, the Court is not bound by the Master's report. Id.

Furthermore, in distributing marital property, a Court may not presume a fifty/fifty division, but, instead, must analyze the factors set forth in 23 P.S. Sect 401(d) (now 23 Pa. C.S.A. sect 3502(a)). Powell v. powell, 395 Pa. Super. 345, 577 A.2d. 576, 579 (1990). Accordingly, the Court finds the Master erred in recommending a fifty/fifty division of the marital property without considering the factors found under sect 3502 (a) of the Divorce Code.

After carefully considering the sect 3502(a) factors, this Court feels that a forty-five/fifty-five division of the marital property in Wife's favor is appropriate. The Court's analysis of the sect 3502(a) factors is as follows:

(a) The Length of the marriage. The marriage by today's standards was a lengthy one, lasting for a period in excess of seventeen years, from 1965 to 1983.

(b) Any prior marriage of either party.

This was the first marriage for both parties.

(c) The age, health, station, amount and sources of income, vocational skills, employability, estate, liabilities and needs of each of the parties.

Both parties are relatively young; Husband having been born January 26, 1945 and Wife having been born October 27, 1944. Furthermore, the Court finds that both parties are in good health. Although Husband contends that he suffers from debilitating depression, the Court notes that it has not prevented Husband from representing himself vigorously in this divorce action. Furthermore, Husband failed to present any credible evidence at the Master's hearings concerning his alleged "illness". Accordingly, the Court finds Husband's claims of depression to be without merit.

Husband currently possesses a Bachelor's Degree, Masters of Divinity Degree, a Juris Doctorate Degree, and a Master of Laws Degree

in Taxation. From approximately 1974 through six months prior to the parties' separation, Husband was gainfully employed as an attorney. Accordingly, Husband's educational background, training, and employment history show him to be employable in any number of career fields.

Wife, on the other hand, had prior to the marriage completed the training necessary to become a Registered Nurse and was employed for a great many years in the health field. However, because Wife has not completed a Bachelors degree her continued employability in the health field has become somewhat limited and she has been forced to seek employment elsewhere. At the time of the Master's hearing, Wife was primarily employed as a waitress.

Because Husband's employment opportunities are substantially greater and more lucrative than Wife's, the Court finds the Wife will require a greater portion of the marital estate in order to meet her needs in

the coming years.

(d) The contribution by one party to the education, training or increased earning power of the other party. At the time the parties married, Wife had already completed her nursing education and entered the health field. Husband, during the marriage, completed his college education and obtained a Bachelor's Degree, a Master Degree, began work on a Ph.D, entered law school and obtained a Juris Doctorate Degree. Wife contributed not only financial but emotional support toward Husband's educational endeavors. Clearly, Wife has contributed significantly towards the education and increased earning power of Husband. The fact that Husband may or may not choose to take advantage of his extensive education does not negate Wife's contribution towards such education.

(e) The Opportunity of each party for future acquisition of capital assets and

income.

Clearly, Husband, should he choose to utilize any one of his varied degrees, will be in a much better position to acquire capital assets and income in the future than Wife. While Husband has the opportunity to be employed as a teacher of theology or a tax attorney, Wife, unless she seeks additional education can look forward to waitressing, a traditionally low-paying job, until her retirement.

(f) The sources of income of both parties, including but not limited to medical, retirement, insurance or other benefits. Both parties' sources of income appear to be limited to their employment. However, as stated above, considering Husband's extensive education and Wife's somewhat limited education, Husband can expect to earn substantially more than Wife.

(g) The contribution or dissipation of each party in the acquisition, preservation,

depreciation or appreciation of the marital property, including the contribution of a party as homemaker. The Court is satisfied that, at least, until the parties separated neither party dissipated marital assets and both parties contributed to the acquisition, preservation, and appreciation of the marital estate. Wife, as previously stated, financially and emotionally supported Husband through his education, which spanned approximately ten years. Husband, on the other hand, put substantial effort into improving the various homes owned by the parties throughout the marriage.

(h) The value of the property set apart to each party. Aside from the marital estate, neither party has significant non-marital property.

(i) The Standard of living established during the marriage. Court finds that during the latter part of the parties' marriage the parties enjoyed what could be best described

as an upper class standard of living.

(j) The economic circumstances of each party, including Federal, State, and local tax ramifications, at the time the division of property is to become effective. At the time the marital property is distributed both parties' economic circumstances should be relatively stable. Wife will be able to supplement her limited income with income derived from her share of the marital estate. Husband, on the other hand, should be able to meet his economic needs through employment. Furthermore, his share of the marital estate, albeit less than Wife's will provide Husband with financial security.

(k) Whether the party will be serving as a custodian of any dependent minor children. Neither party is the custodian of any dependent minor children.

Based on the above analysis, it is clear that Husband's extensive education, training, employment history, and ability to acquire

captial assets and income in the future as well as Wife's significant contribution to Husband's education, training and earning power mandate that Wife be awarded a greater portion of the marital estate. This Court feels that a forty-five/fifty-five division of marital estate in Wife's favor is appropriate.

2. Value of Husband's Law Practice

Prior to the parties' separation, Husband was employed as an attorney and was the sole proprietor of his own law practice. In his report and recommendation, the Master found Husband's law practice to have no value. Wife has filed an exception to this finding alleging that Husband's law practice should be valued at $50,000.

Wife argues that this Court must value Husband's law practice at $50,000 because Husband did not comply with a Court Order dated March 15, 1985, which ordered Husband to file an inventory and Appraisement and to respond to outstanding interrogatories within

30 days of the order. The Court would remind Wife that the purpose of the Divorce Code is to effectuate economic justice between the parties. 23 Pa.C.S.A. sect 3102(a)(6) (Purdon's Supp. 1991). Clearly economic justice will not be effectuated if this Court places a value on Husband's law practice when, in reality, the value of Husband's law practice is non-existent.

The Master, in his report and recommendation, found that the personal property of the parties had been divided to the satisfaction of the parties. Neither party filed an exception to this finding. Certainly any tangible assets of Husband's law practice such as furniture, equipment and books were included in the personal property.

Since the tangible assets of the law practice have been divided to the parties' satisfaction, the only other possible asset of Husband's law practice would be goodwill. However, this Court finds that Husband's law

practice did not possess a goodwill value. As Husband states in his brief in opposition to Wife's exception, there is simply no authority for placing a goodwill value on a law practice operated as a sole proprietorship. There is, however, authority to the contrary. In the case of Beasley v. Beasley, 359 Pa. Super. 20, 518 A.2d. 545 (1985), the Superior Court held that goodwill is not a factor in valuing a law practice because the goodwill involved could not be sold or transferred. A later Superior Court case provided that "[i]f the nature of economic goodwill is purely personal to the professional spouse, it is not alienable hence, it cannot actually be realized and may not be included in equitable distribution." Fexa v. Fexa, 396 Pa. Super. 481, 578 A.2d. 1314, 1317 (1990). Since any economic goodwill present in Husband's law practice is purely personal to Husband, it may not be included in the equitable distribution.

The Court would note, however, that while

it has declined to asses Husband's law practice a goodwill value, it has, in determining the percentage distribution, given great weight to the fact that Husband, is, among other things, an attorney and as such has substantial earning capacity.

3. **Fair Rental Value of the Marital Home**

Husband has resided in the marital home from the time the parties separated in 1983 to the present time. All expenses of the marital home, including mortgage payments, insurance, taxes, and repairs to the property, were ordered to be paid out of a joint account which was funded by rental income from a commercial property located on the grounds of the marital home and by the sale of another house which had been marital property. By Order of Court dated August 30, 1983, the Court directed that "[s]ince the parties' son is now residing in the jointly owned residence with his father, Husband shall not be required to pay any rent to Wife provided he shall

continue to maintain the real estate at 1130 Penn Grant Road and not let it deteriorate and do the work around the property, including the commercial property, which he has done in the past."

The Master in his report and recommendation did not award Wife one-half of the fair rental value of the marital home which Wife contends was an error. Wife feels that she should be awarded the fair rental value of the marital home from September of 1984 (when the parties son became emancipated and/or self supporting) to the present time.

Wife alleges that the fair rental value of the marital home is $600 per month and that she should, therefore, be awarded one-half or $300 per month. Furthermore, Wife contends that she should be awarded an additional amount in excess of $16,000 because of Husband's failure to maximize the income from both the commercial and residential properties.

Clearly, the Court may award one-half of the fair rental value to the party out of possession. Gee v. Gee, 314 Pa. Super. 31, 460 A.2d 358 (1983). While the Court finds some merit to Wife's argument concerning the fair rental value of the marital home, it finds no merit in Wife's argument that Husband failed to maximize the rental income.

Since the separation, Husband has not only resided in the marital residence, but he has managed and maintained the commercial and residential property, which includes acquiring tenants, collecting rents, cleaning and repairing the leased premises and maintaining the grounds. The fact that Husband may have been able to charge rents in excess of what he did does not, in the Court's opinion, constitute dissipation of marital assets.

However, the Court cannot neglect the fact that following his emancipation the parties' son and Husband continued to reside in the marital home rent free despite the fact

that the son was employed on a full time basis. According to testimony presented at the Master's hearings, the fair rental value of the marital home is $600 per month. The Court feels that Husband should be reimbursed $100 per month for managing and maintaining the marital home and commercial property. Accordingly, this Court feels wife should be reimbursed the sum of $200 per month from September 1984 through to the date of the marital home and commercial properties are sold.

**4. Valuation and Distribution of the Marital Residence.**

The Master in his report and recommendation valued the marital home a of 1988. Wife contends this is an error and this Court agrees. The case of Sutliff v. Sutliff, 518 Pa. 378, 383, 543 A.2d. 534, 537 (1988) mandates that marital property must be valued at a date as close to distribution as possible. Accordingly, this Court feels that

the marital residence should be valued as of the date of distribution. Since the Court is going to order the marital home sold and the proceeds distributed, it will in effect be valued as of the date of distribution.

Wife also contends, and once again this Court agrees, that the Master erred in recommending that Husband be allowed to, in effect, purchase the marital home by giving Wife a 10 year mortgage or through refinancing. As Wife points out in her brief in support of her exception, Husband had given "neither the Master nor Mrs. Mummau any reason to believe he is capable of paying the first, much less, a second mortgage." While Husband is certainly able to maintain employment sufficient enough too enable him to purchase the marital property, this Court cannot guarantee that he will. Under the Master's recommendation, if Husband continues along his current path of underemployment, Wife, through no fault of her own, could lose her share of

equity in the marital home.

Accordingly, the Court feels that both Husband's and Wife's best interests will be advanced by ordering the house sold and the proceeds distributed between the parties in such a way as to effectuate a forty-five/fifty-five division of the marital estate in Wife's favor.

If the parties are unable to agree as to a listing price and listing agent for the marital home, both parties will choose a real estate agent. The two agents will proceed to choose a third agent who will be the listing agent of the marital home. The parties shall follow the third agent's recommendation as to listing price of the marital home. The parties shall accept any reasonable offer. In any event, any offer within 5% of the list price shall be accepted by the parties unless otherwise agreed by the parties.

5. **Attorney's Fees and Expenses**

Wife contends that the Master erred in

not awarding her any portion of her attorney's fees. Evidence presented at the Master's hearings shows that Wife has incurred attorney's fees of approximately $35,000. A careful review of the record reveals that many of these fees were incurred due to Husband's dilatory, obdurate and uncooperative behavior.

An award of counsel fees is appropriate when necessary "to put the parties on par in defending their right". Adelsteiin v. Adelstein, 381 Pa. Super. 221, 553 A.2d. 436 (1989). Clearly, an award of counsel fees is appropriate in this case to place Husband and Wife on a par in defending their rights. Husband who represented himself throughout much or this litigation, was able to and did file motion after motion at virtually no cost to himself. Wife, on the other hand, had to expend great sums of money in attorney fees to defend these motions, many of which were without merit.

Husband, in his brief in opposition to

Wife's exceptions, argues that Wife should not be awarded counsel fees because she has not shown "actual need" for such an award. Husband contends that after equitable distribution Wife will be able to pay her own counsel fees.

The Court finds Husband's position to be without merit. As stated previously, Wife will require a great portion of the property set aside to her through equitable distribution to supplement her somewhat limited income and to provide for her basic needs. A deduction of over $35,000 in attorney's fees from Wife's equitable distribution award will mean that Wife will be unable to provide for herself. Accordingly, the Court feels that a $10,000 award of counsel fees to Wife is appropriate under these circumstances.

**5. IRA'S**

At the date of the Master's hearings, both parties owned Individual Retirement

Accounts. Husband's had a value of $20,000 and Wife's had a value of $11,000. The Master recommended that both of these IRA's be awarded to Wife. Although neither party has filed an exception to this recommendation, the Court feels the more equitable method of distributing the IRA's would be to award Husband's IRA to Husband and Wife's IRA to Wife. In this manner Husband will not have to fill out the complex paperwork necessary to transfer his IRA to Wife in such a way as to avoid the imposition of a penalty.

Based on the foregoing, the Court enters the following order:

**O R D E R**

**AND NOW,** this 24th day of September, 1991, it is Ordered that the Master's Report be modified as follows:

1. The following is awarded to Husband:

| | |
|---|---|
| Husband's IRA | $ 20,000 |
| Total | $ 20,000 |

2. The following is awarded to Wife:

| | |
|---|---|
| Wife's IRA | $ 11,000 |
| Municipal bonds | 21,000 |
| Certificate of dep. | 17,000 |
| W. Donegal Prop. | 1,500 |
| Interest Income | 2,800 |
| Delaware Reserve Fd. | 300 |
| Joint Chkg account | 31,000 |

3. Within thirty (30) days of the date of this Order, the parties' property located at 1130 Penn Grant Road shall be placed on the market for sale. If within fifteen (15) days of the date of this Order the parties are unable to agree on a listing price or a listing agent for such property, each party shall select a real estate agent of their choice. The two real estate agents shall then agree upon a third agent. The third agent shall list the parties' real estate for sale and the parties shall be bound by the third agent's recommendation as to a listing price for the real estate.

The parties shall accept any reasonable

offer for the real estate but in any event shall accept any offer within 5% of the list price.

Following the sale of the property, the net proceeds (after paying sales commission, transfer tax, and any miscellaneous costs of sale) shall be distributed in such a way as to effectuate a forty-five/fifty-five division of the marital property in Wife's favor. The following formula shall be used:

**TOTAL MARITAL PROPERTY**

| | |
|---|---|
| Joint checking account | $ 31,000 |
| Husband's IRA | 20,000 |
| Wife's IRA | 11,000 |
| Municipal bonds | 21,000 |
| Certificate of deposit | 17,000 |
| West Donegal Property | 1,500 |
| Interest income | 2,800 |
| Delaware Reserve Fund | 300 |
| Net Proceeds | ? |

**TOTAL MARITAL ESTATE = TOTAL VALUE**

Total value x 55% = Wife's Share

Wife's share - $85,000 = cash due Wife from net proceeds

Remaining proceeds are awarded to Husband except as provided below

**4.** At the time of the sale of the marital property, Husband shall, put of his share of the proceeds, pay the sum of $10,000 to Wife as and for her attorney's fees.

**5.** At the time of the sale of the marital property, Husband shall pay the sum of $200 per month from September of 1984 through the date of the sale of the marital home to compensate Wife for one-half the fair rental value of the marital property.

**6.** Capital gains tax due because of the sale of the property shall be shared equally by the parties.

**7.** Other than the items mentioned above, the Master's Report is approved.

Upon payment of final costs, a Decree in Divorce shall issue.

BY THE COURT

Wayne G. Hummer, Jr.

JUDGE

**D E C R E E**

AND NOW, this 30th day of October, 1992, the Court having heard the within cause before a Master to review the pleadings and to determine the same s to the law and justice, and having approved the Master's Report, by virtue of the authority vested in it by law, does decree that the said O. HOWARD MUMMAU and MURIEL J. MUMMAU be and they are hereby divorced from the bonds of matrimony on the grounds that the marriage is irretrievably broken and the parties consent to a divorce; and subject to an Order entered by this Court on September 24, 1991, a copy of which is attached to this Decree, all and every the duties, rights and claims accruing to either

of the said parties at any time heretofore in pursuance of the said parties at any time heretofore in pursuance of the said marriage shall henceforth cease and terminate and the said parties shall severally be at liberty to marry again in like manner as if they had never been married.

BY THE COURT:

Wayne G. Hummer, Jr.

Judge

J. A31033 :

O. HOWARD MUMMAU, : IN THE SUPERIOR

Appellant : COURT OF

v. : PENNSYLVANIA

MURIEL J. MUMMAU : NO. 3093

: Philadelphia 1991

Appeal from the Order Entered September 24, 1991, in the Court of Common Pleas of Lancaster County, Civil Division, No. 182 JULY TERM 1983

BEFORE: JOHNSON, FORD ELLIOTT AND HOFFMAN, JJ.

MEMORANDUM:

Appellant brings this instant appeal from an order of equitable entered by the trial court September 24, 1991. This order, and its attached opinion, rejected many of the recommendations of the Master's report. Among these was the Master's suggested equal 50/50 division of the marital property; the trial court altered this to a 55/45 split in favor of appellee wife. The court also imposed on appellant husband the payment of $10,000 in

attorney's fees for appellee wife, and the assessment of $200 per month rent for appellant's use of the marital residence until sale and distribution.1 Not all of the changes made by the trial court favored appellee. The Master had recommended that an IRA 2 in appellant's name and valued at $20,000 be given to appellee. The court order redistributed this item to appellant.

On appeal, appellant asserts several errors, but all go to essentially two bases: 1) that the trial court was biased against

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1. The rent imposed was actually one half the fair market value of $600 per month or $300. The court allowed a discount of $100 per month as recompense for husband appellant's services in managing and caring for the property.

2. Individual Retirement Account.

appellant and should have recused,3 and 2) that the trial court committed an abuse of discretion in the various alterations to the Master's recommendations.

As much as we would prefer to conserve judicial economy and resolve the issues presented to us by this appeal, we find ourselves unable to do so because of a procedural defect. Because no decree in divorce has yet been entered in this case, we may not hear this appeal. This court has previously held that "a pre-divorce order of equitable distribution is interlocutory and cannot be reviewed until rendered final by the

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3. The bias allegedly stemmed from two causes. First, appellant is an attorney who had run for judge against the trial judge. Second, appellant had previously prosecuted a case of malpractice against that trial judge.

entry of a divorce decree." See Colagioia v. Colagioia, 362 Pa. Super. 213, _____, 523 A.2d 1158, 1160 (1987). Although neither party has addressed this issue, we note that because it goes to the jurisdiction[4] of this court, we are required to raise the matter sua sponte. See Aloi v. Aloi, 290 Pa. Super. 125, 434 A.2d 161 (1981), appeal after remand, 299 Pa. Super. 400, 445 A.2d 815 (1982).

We are aware of the likelihood that appellant will, following this quashal, simply obtain the decree in divorce and refile his appeal. In the interest of judicial economy, we would rather have resolved this appeal on the merits. Had this failure to enter a decree been the result of inadvertence on the

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4.Our jurisdiction is limited to appeals from final orders and to such appeals from interlocutory orders as authorized by law or allowed by our permission upon lower court certification. 42 Pa. C.S.A. Sect 702, 742.

part of the trial court, we would do just this. however, it is apparent from the order of equitable distribution that not only was the trial court aware that no decree had been entered, but that the court was purposely withholding the decree pending the payment of final costs. Because the trial court had a legitimate motive for not issuing the decree, we will not consider that which should have been done as having been done.

Accordingly, we quash the appeal. Jurisdiction relinquished.

**O. HOWARD MUMMAU, ESQ., JD LLM**

**Attorney and Counsellor At Law**

1130 Penn Grant Road

Lancaster, Pa. 17602

(717)687-0743

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January 20, 1993

Greta R. Aul, Esq.

33 North Duke Street

Lancaster, Pa. 17602

Re: Presentation of Petition For Contempt

Dear Ms. Aul:

I am writing this at 11:00 A.M. January 20, 1993 having just come from our joint appearance before Judge Hummer at which you presented your Petition For Contempt. I was hoping that a court reporter would have been present to document your remarks and those of the court. Since that was not the case, I am making this memorandum to you with a copy to the court.

Both you and the court must be aware that one remark in particular which you made to the court raised perturbing questions for those present.

Specifically I would like to have an explanation of your statement to the court following the presentation of your petition and near the close of your argument when you said: "Judge, you owe this to me!" On what basis did you assert that the court "owes" you the granting of the relief sought? Under ordinary circumstances such a statement to a judge could be the basis for contempt, because it clearly suggests that the court has been corrupted.

The record of the case has already established ethical/legal improprieties as among yourself and more than one member of this Lancaster County bench. However, your statement in court this morning has raised to a new level the implication that there exists some reason or reasons for you to <u>expect</u>

"favors" from the court. I want to know what those reasons are. Perhaps it is significant that you made your claim of "entitlement" in the context of the court responding that he had never even heard of the type request that your are making in this case and that he had never granted the kind of relief you seek.

In my eighteen years of practicing law I have never before heard an attorney insist that a judge "owed" him or her a particular ruling. Your statement implies a corrupted relationship. The consequence of the relationship suggested by your statement is a total perversion of the very meaning of "law" itself. I believe it merits further inquiry by appropriate authorities.

Sincerely yours,

O. Howard Mummau

cc: Honorable Wayne G. Hummer, Jr.

(Superior Court Record p.374a)

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

O. HOWARD MUMMAU :

VS. : 182 July Term, 1983

MURIEL J. MUMMAU :

**RULE**

**AND NOW,** this 20th day of January, 1993 upon consideration of the within Petition, it is hereby Ordered that a rule be entered upon Plaintiff to show cause why he should not be in contempt of the Court's Order of October 30, 1992 and why Defendant should not be granted a power of attorney to sign a listing Agreement on behalf of the Respondent to sell the marital residence as well as all documents necessary to effectuate the terms of the Court's Order (2 certificates of Deposit, closing forms for joint account, sales Agreement, and deed if necessary)

Rule returnable 20 days.

BY THE COURT:

(S): WAYNE G. HUMMER, JR. J.

**O. HOWARD MUMMAU, ESQ. JD LLM**

Attorney and Counselor At Law

1130 Penn Grant Road

Lancaster, Pa. 17602

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June 10, 1994

Honorable Wayne G. Hummer, Jr.

Judges Chambers

Lancaster County Courthouse

50 North Duke Street

Lancaster, Pa. 17602

Re: Mummau vs. Mummau, No. 182 July 1983

Dear Judge Hummer:

I am writing to clarify an important point I believe was misrepresented by opposing counsel in your business court earlier today when she presented her Petition For Special Relief/Enforcement of Decree. She states in her petition at paragraph 5 that "The parties were divorced on or about October 30, 1992..."

Opposing counsel fails to mention that

there was no bifurcation of the divorce in this case. This issue was fully raised in the answer to the earlier like petition filed by attorney Aul.

It is respectfully requested that you review Respondent's answer and brief to the previous petition. I wish to reiterate that an appeal from a non-bifurcated divorce is not an appeal from an order of equitable distribution and is not subject to the Appellate rules relating to supersedeas. Furthermore there cannot be an order of distribution until the divorce is final and the divorce is not final in this case because there has been no bifurcation.

Finally, I wish to advise that I have requested a transcript of this morning's proceedings from Mark Brown, Court Reporter. He advised me that he had to obtain your approval to provide me with the transcript, and that you wanted to review it before it was made available. I note my objection to such

procedures and have requested Mr. Brown to make a part of the record of this proceeding your comments to him regarding the transcript.

Sincerely yours,

O. Howard Mummau

cc: Greta R. Aul, Esquire

Mark Brown, Court Reporter

**O. HOWARD MUMMAU, ESQ. , JD LLM**

Attorney and Counselor At Law

1130 Penn Grant Road

Lancaster, Pa. 17602

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July 27, 1994

Mark Brown, Court Reporter

Court Reporter's Office

50 North Duke Street

Lancaster, Pa. 17602

Re: Mummau vs. Mummau, No. 182, July 1983

Dear Mr. Brown:

This will confirm my conversation with you by telephone on July 26, 1994 at which time I requested for a second time the transcript of business court proceedings of Friday, June 10, 1994 before Judge Hummer, for which you were the court reporter. You advised me that you had been instructed by the court not to provide this transcript. I requested in our

conversation yesterday, and I am now requesting by this letter that you provide me a written statement indicating that you will not provide the requested transcript and the reasons for the refusal.

Sincerely yours,

O. Howard Mummau

Taken from the Superior Court Reproduced Record at pages 256a-266a from invoices of opposing counsel' law firm:

APPEL, YOST AND SORRENTINO

33 North Duke Street

Lancaster, Pa. 17602

Billed and Unbilled Time Records for file: 735501; File Name: Mummau, Muriel J.

Client Name: Muriel J. Mummau

| DATE - | ATTY | ---------TRANSACTIONS----- |
|---|---|---|
| 9/24/84 | GRA | Meet with Judge Mueller re: Argument Court and Motion for sanctions. |
| 9/25/94 | GRA | Telephone conference to Sally(Judge Hummer's Secretary) re: missing Rule |
| | GRA | Telephone conference from Sally: Letter to Judge Hummer |
| 10/03/84 | GRA | Conference with Judge Perezous Re: Judges |

| | | |
|---|---|---|
| 03/05/85 | GRA | Telephone call to Judge Hummer re: hearing |
| 03/06/85 | LSM | Trip to Judge Hummer to deliver Rule and motion for additional discovery |
| 05/06/85 | | Telephone call to Kathy at Judge Hummer's office; will call back |
| 06/08/85 | | Telephone call from Judge Hummer's clerk; phone call to client re: same |
| 10/25/85 | | Conference with Judge Hummer re: scheduling hearing |

Testimony of James Clymer, Esquire on 11/7/85 taken from Superior Court Reproduced Record at p. 236a

Q. Did you express any concern to me following that conference (a chambers conference, absent a court reporter, with Judge Hummer) regarding your position, the possible jeopardy to your own practice as an attorney in this Court by continuing to represent me in this divorce case?

A. I may have.

Q. If you did, is that an acknowledgment that you have some concern about that?

A. I would certainly have concern about my reputation with the Court and with the Bar.

Q. And do you believe that to continue to represent me may jeopardize that?

A. I am not sure what your definition of the word, "jeopardize", would be.

Q. Put you in disfavor of some kind?

A. I think that was a thought that probably

entered my mind, yes.

Q. And you may have expressed it to me?

A. Yes, I likely did.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

O. HOWARD MUMMAU : No. 182

VS. : July Term

MURIEL J. MUMMAU : Action In Divorce

PETITION FOR A CHANGE OF VENUE AND ASSIGNMENT OF A JUDGE FROM ANOTHER JURISDICTION

TO THE HONORABLE JUDGES OF THE COURT:

1. Petitioner is O. Howard Mummau,an adult individual who is an attorney at law admitted to practice before the courts of Pennsylvania and residing at 1130 Penn Grant Road, Lancaster, Pennsylvania.

2. Petitioner is the Plaintiff in the instant divorce action commenced in July 1983.

3. Petitioner is also a Plaintiff as is

Defendant herein in an action in assumpsit and trespass against J. David Young, Attorney At Law, which action was filed in July 1981 to No. 193, July Term, 1981.

4. J. David Young, Esq., the Defendant in the action at No. 193, July 1981 is also a member of the Lancaster Bar and practicing law before the judges of Lancaster County.

5. The action against J. David Young, Esq. arises out of an alleged breach of contract asserted in connection with a professional attorney association between Plaintiff Petitioner herein and said J. David Young. Petitioner also asserts, in that action, claims in trespass for wrongful termination of employment by J.D. Young of Petitioner as retaliation for Petitioner's activities as a candidate for judge of the Court of Common Pleas of Lancaster County in the Primary election of 1979.

6. Petitioner further asserts in his cause against J. David Young that the action of said

Defendant Young in wrongfully terminating the employment of Petitioner was motivated by the desire or belief of J. David Young that his actions would ingratiate himself to or be viewed favorably by certain of the judges of Lancaster County Court of Common Pleas and that said action would inure to his benefit.

7. At the time of Petitioner's candidacy in 1979 or shortly thereafter four of the present judges of the Court of Common Pleas of Lancaster County had in one way or another taken specific action(s) to express their disapproval of Petitioner's candidacy and to hold Petitioner up to ridicule to third persons, the apparent intent being to bring professional opprobrium upon Petitioner. Those judges are Judge Buckwalter, Judge Eckman, Judge Mueller and President Judge Appel.

8. Judge Buckwalter, then District Attorney, threatened Petitioner to either remove himself as a candidate from the primary election for

judge or prepare to be terminated as an assistant district attorney. Judge Eckman, on numerous occasions in court, made express statements denigrating Petitioner's candidacy. Judge Mueller circulated a memorandum among courthouse personnel, the intent and purpose of which was to promote Petitioner's termination as an assistant district attorney. Judge Appel admitted to Petitioner that he was not displeased to learn before the fact that Petitioner was to be terminated as an assistant district attorney. Petitioner was, in fact, terminated without just cause, as an assistant district attorney.

9. Of recent date, J. David Young, Esq. Defendant in No. 193 July 1981, by his counsel, Christopher S. Underhill, filed a pre-trial conference report in which he indicated, inter alia, that he intended to call Judge Appel and Judge Buckwalter as his witnesses at the trial of this case. He also indicated that he may also call Judge Eckman

and Judge Mueller. He indicated that he would also call the Defendant herein, Muriel J. Mummau.

10. Petitioner is also Plaintiff's attorney in a legal malpractice action which had been initiated by summons several months prior to the initiation of this divorce proceeding. Judge Hummer of this court is a named defendant in that action and is aware of the nature of the claims of that cause.

11. The claims of Petitioner against J. David Young include claims for money damages, which damages constitute marital property for purposes of Petitioner's divorce action herein.

12. Judge Mueller and Judge Hummer have already entered orders with respect to various issues that have arisen in this divorce action. Both have shown their biases against Petitioner by their rulings and Judge Mueller stated in open court that he wanted nothing more to do with this case - "that anything

further should be taken to another judge."

13. Defendant Muriel J. Mummau has been fully aware prior to her separation from Petitioner of all the facts surrounding the circumstances of Petitioner's dismissal as an assistant district attorney and his termination by J. David Young. Defendant's belief that these circumstances can now be used to her legal advantage against Petitioner contributes substantially to her intractable posture with respect to Petitioner's repeated attempts to avoid protracted and costly divorce litigation.

14. The judge or judges of this court are the triers of fact in divorce actions either by their appointed divorce masters or by review of their master's reports.

15. Petitioner is in the position of having the same judges who are to be called as witnesses against his claims for damages in one highly political case, which damages, if recovered would constitute marital property,

deciding in this divorce case, what portion of said marital property shall belong to Petitioner.

16. The judges of this court are clearly not personally disinterested in this divorce case because of their heavy involvement in the related action of Petitioner against J. David Young, attorney.

17. Petitioner believes and therefore avers that in order for him to receive just, fair and impartial consideration of this divorce case it is necessary that this action be transferred for further proceedings to another county before disinterested judges.

WHEREFORE, Petitioner requests that the Court set a hearing on this Petition and further requests that a judge from another jurisdiction hear the evidence in support thereof. All proceedings to stay pending disposition hereof.

RESPECTFULLY SUBMITTED

O. Howard Mummau

VERIFICATION

I verify that the statements made in the foregoing Petition are true and correct. In understand that false statements herein are made subject to the penalties of 18 Pa.C.S. section 4904, relating to unsworn falsification to authorities.

O. Howard Mummau

CERTIFICATE OF SERVICE

I certify that I have on the date indicated served a true and correct copy of the within Petition upon the person named by hand delivery at the address indicated.

Greta R. Aul, Esq.

Suite 216, Old Post Officer Bldg.

Prince and Chestnut Streets

Box 89, Lancaster, Penna. 17603

Dated: May 11, 1984 O. Howard Mummau

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA - CIVIL

O. HOWARD MUMMAU : NO. 182

VS. : JULY TERM, 1983

MURIEL J. MUMMAU :

O R D E R

AND NOW, May 14, 1984, upon consideration of Plaintiff's Petition for change of venue and assignment of judge from another jurisdiction, the Defendant's answer and new matter thereto, such request is denied as being without either factual foundation or legal merit.

BY THE COURT:

signed: Michael J. Perezous,

Judge

copies to:

O. Howard Mummau, Esq.

Greta r. Aul, Esq.

(Taken from the transcript of a hearing in the trial court 9/19/85 reproduced in part in the Superior Court reproduced record)

MR. CLYMER: [representing Mr. Mummau] Your Honor, I have a couple of preliminary matters I would like to call to the court's attention If I may please....I wonder if there is an explanation why the public is barred from this hearing. As I understand it is a public hearing. I just want to note an objection that the public apparently is being barred.

THE COURT: I haven't barred anybody from this hearing.

THE BAILIFF: The sheriff has, Judge, until they are called.

THE COURT: You mean prospective witnesses?

MR. CLYMER: No. They are members of the public who would like to attend the hearing.

THE COURT: We customarily, out of the respect for the parties and their personal feelings in marital cases of this nature, do not permit the public to sit in.

MR. CLYMER: Okay, I just want to not emy objection.

THE COURT: You object to that? What do you object to?

MR. CLYMER: I object to the fact that the public is not permitted to attend the hearing.

THE COURT: A marital proceeding?

MR CLYMER: Yes, your Honor, this is a contempt proceeding.

..... So we are still presenting the fact that that Order [of March 15, 1985] was improperly entered inasmuch as the plaintiff had no notice of the hearing and the rules were not complied with and we think we ouoght to be able to challenge that before the Court today.

.... My understanding is that at that same hearing evidence was presented stating that first of all the Prothonotary had notice of Mr. Mummau's new address. The address to which the notice ws sent was an old address, which he no longer resided, no longer had a

place of business. The fact remains that he had no actual notice of that hearing. No notice actual or otherwise of that hearing and the hearing was held in his absence and without his knowledge.

.....

THE COURT: We'll not hear the issue of the validity of the order of March 15, 1985, Mr. Clymer.

....

MR. CLYMER: And another matter, Your Honor, is that I would ask the Court to recuse himself from this case because of--pursuant to Canon threer of the Code of Judicial Conduct inasmuch as Your Honor is the Defendant in an action which was brought by a plaintiff represented by Mr. Mummau at an earlier time and we just feel that the Court is not able to, under the circumstances to, view this case without bias or prejudice.

.....

THE COURT: It's been discussed numerous times.

I think the pleading was filed that Mr. Mummau has brought proceedings against every member of this bench, save one.

MR. CLYMER: Your Honor, this was not, as you know--this is not Mr. Mummau's own action. There was an action on behalf of a client of his that was brought.

THE COURT: What action?

MR CLYMER: Pardon me?

THE COURT: What action?

MR. CLYMER: Crumley versus Hummer and Zimmerman.

MR. CLYMER: And it is not as though Mr. Mummau is suing members of the bench.

THE COURT: I can assure everyone in this courtroom I have no bias against anybody in this courtroom.

(Excerpt from Appellant's Brief in the Superior Court) at Page 6.

**STATEMENT OF QUESTIONS INVOLVED**

I. DID JUDGE WAYNE G. HUMMER, JR., THE LOWER COURT JUDGE WHO ENTERED THE DECREE AND ORDER FROM WHICH THIS APPEAL IS TAKEN, COMMIT PREJUDICIAL ERROR IN REFUSING TO RECUSE HIMSELF BECAUSE OF A CONFLICTING RELATIONSHIP BETWEEN HIMSELF AND THE HUSBAND WHO IS ALSO AN ATTORNEY? Suggested Answer: Yes.

II. DID THE LOWER COURT COMMIT PREJUDICIAL ERROR IN REFUSING TO ASSIGN A JUDGE OF ANOTHER JURISDICTION TO THIS CASE, BECAUSE, IN ADDITION TO THE CONFLICT WITH JUDGE HUMMER, FOUR OF FIVE OTHER JUDGES OF THE LOWER COURT WERE NAMED AS WITNESSES AGAINST HUSBAND, A MEMBER OF THE BAR, IN A SEPARATE CIVIL ACTION PENDING IN THEIR COURT DURING THIS DIVORCE ACTION? Suggested Answer: Yes.

(Excerpt from Petitioner's Petition For Allowance of Appeal to the Pennsylvania

Supreme Court, at page 1)

I. QUESTIONS PRESENTED FOR REVIEW:

In affirming the trial court, the panel of the Superior Court has erred in the following respects: A. Petitioner has been denied fundamental rights to due process of law and to an impartial judiciary under the Pennsylvania and United States Constitution. In finding that the trial court Judge, Wayne G. Hummer, Jr. had not abused his discretion in refusing to recuse himself and that the trial court had not abused its discretion in refusing to grant a change of venue or to appoint a judge of another jurisdiction, the Superior Court failed to consider the analysis of the Supreme Court case which it cited as authority. (Goodheart v. Casey, 523 Pa. 188, 565 A.2d 757 (1989) The Superior Court failed to consider the constitutional proscription against a violation by a judge of a canon of legal or judicial ethics and that the record discloses an improper relationship between the

trial court and Respondent's attorney.

---

THE SUPERIOR COURT OF PENNSYLVANIA

OFFICE OF THE PROTHONOTARY

2044 ROBERT N.C. NIX, SR. FEDERAL BUILDING

NINTH AND CHESTNUT STREETS

PHILADELPHIA, PENNSYLVANIA 19107

DAVID A. SZEWCZAK, ESQUIRE
PROTHONOTARY

BEATRICE CURTISS
DEPUTY PROTHONOTARY

PHILADELPHIA
OFFICE

August 16, 1988

O. Howard Mummau, Esq.

1130 Penn Grant Road

Lancaster, Pa.

Re: O. Howard Mummau, Appellant v.

Muriel J. Mummau, No. 2131

Philadelphia 1988

Dear Mr. Mummau:

This is to advise that the following Order has been entered in the above captioned matter:

"AND NOW, this 16th day of August, 1988, the appellant's application to be excused from reproducing the record is DENIED AS MOOT in light of this court's order this date quashing the appeal as premature, having been taken from an interlocutory order not made appealable by rule or statute.

s/Per Curiam"

Very truly yours,

David A. Szewczak

Prothonotary

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA CIVIL ACTION - LAW

O. HOWARD MUMMAU, :

Plaintiff : July Term, 1983

vs. : No. 182

MURIEL J. MUMMAU : Action In Divorce

ORDER

AND NOW, this 15th day of March, 1985, after a hearing on the issue of what sanctions should be imposed, the Court Orders and Directs that:

1. The Plaintiff is hereby ordered to file an Inventory and Appraisement and to respond to Interrogatories which are currently outstanding within thirty(30) days. In the event that Plaintiff fails to fully answer the Interrogatories and to submit a complete Inventory and Appraisement, the Court directs that defendant's values as to the marital property will be accepted as filed thereafter;

2. Plaintiff is hereby ordered to provide all documents sought in Defendant's

Motion for Leave to Take Additional Discovery, filed with this Court on March 7, 1985, including any appraisals made of property owned by either or both of the parties within the past three (3) years; any financial statements drafted by or on behalf of the Plaintiff for the last five years; income tax forms for the last five (5) years; any written agreements pertaining to the sale of any property or business owned by either the Plaintiff or the Defendant or both; checking account statements for the past five (5) years, and copies of all checks drawn on the accounts for the past three (3) years for all checking accounts owned by either or both of the parties; copies of all leases or agreements for rental of real property signed by the Plaintiff pertaining to the past five (5) years as either landlord or tenant; copies of settlement sheets for any real estate which has been sold in the past five (5) years which was owned by either or both parties; any

documents indicating that the Plaintiff may have received a bequest or devise or other gift since the date of the marriage between the parties; written reports or statements from any proposed witnesses in the above-captioned action, whether expert or fact witnesses; statements for any other accounts for the last five (5) years which are maintained in the name of the Plaintiff alone or in the name of the Plaintiff and anyone other than the Defendant; and any additional documents regarding income, payments, accounts receivable, etc. pertaining to the law practice of the Plaintiff for the past five (5) years;

3. All costs, expenses, and attorneys' fees with respect to additional discovery required by Plaintiff's failure to comply with the Court's Order of March 15, 1984 to be paid by the Plaintiff by a payment of Five Hundred ($500.00) Dollars made to the Court within thirty (30) days of this Order to protect

Defendant, with an accounting to be made to the Plaintiff for these funds;

4. The sum of Nine Hundred Sixty-one Dollars and 50/100 ($961.50) to be paid to the Defendant or her attorneys by the Plaintiff pursuant to Rule 4019(h) to pay Defendant's reasonable expenses incurred in obtaining compliance with the Order of March 15, 1984;

5. The Defendant shall be permitted to proceed with discovery in this case by deposition of the Plaintiff to the extent that Defendant feels such depositions are necessary.

**BY THE COURT:**

/s/Wayne G. Hummer, Jr. J.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA, CIVIL ACTION - LAW

O.HOWARD MUMMAU, : No. 182, July 1983

Plaintiff

VS : Action In Divorce

MURIEL J. MUMMAU :

Defendant

AFFIDAVIT

O. Howard mummau, Plaintiff in the above captioned action, being duly affirmed according to law deposes and says the following: At the conclusion of the hearing held in the above captioned matter on September 19, 1985 pursuant to the motion of Defendant for additional sanctions against Plaintiff for his failure to have complied with the Order of March 15, 19845, the Court requested that the parties and counsel meet with the Court in chambers. The meeting in chambers was without the presence of a court reporter. During the course of this meeting, the Court acknowledged in the presence of all

that the requests which the Plaintiff has been making for more than two years with respect to discovery of appraisals of marital property and expectancies of the Defendant are proper legal requests despite that fact that Plaintiff has made these requests formally by appropriate motion to the Court and the Court has denied Plaintiff's motions. A copy of this affidavit is being furnished to counsel for Defendant.

O. Howard Mummau

County of Lancaster )
Commonwealth of Pennsylvania) SS:

Affirmed and subscribed before me a notary public in and for the County of Lancaster and Commonwealth of Pennsylvania on this 24th day of September, 1985.

My commission expires 1/16/86

Susan E. Lehigh

(Taken from the transcript of a proceeding in Judge Hummer's Court on Nov. 7, 1985 and part of the reproduced Record in Superior Court at p. 232a. ff)

At the very beginning of the proceeding, after Mr. Mummau requested to meet in chambers with the Court, other counsel and a court reporter, the court made the following remarks:

THE COURT:.."When this file was submitted to the Court on today's date I noticed a one-page document on the front of it, an affidavit. The caption of the case purports to bear the signature of O. Howard Mummau, and a notary thereunder. The notary's date is September 24, 1985.

The document is stamped with the Prothonotary's office stamp under date of September 24, 3:44 p.m., if I am reading the stamp correctly, 1985.

As I review the document, and I am commenting in open court in the presence of all the parties and for the record, there is

indeed, a complete misconstruance of that discussion.

The document purports to say that the Court acknowledged in the presence of all of those present that the request which Plaintiff, meaning Mr. Mummau, has been making for more than two years with respect to the discovery of appraisal of marital property and expectancies of the Defendant are proper legal requests.

The Court never in court, out of court, privately, or otherwise, has ever acknowledged that the requests made by the Plaintiff for more than two years with respect to discoveries of appraisals are proper legal questions.

There will be no argument as to that point because this Court never acknowledged that to be the case, and that is an additional reason, Mr. Mummau, why this Court will have no sessions with you in chambers.

So what you choose to say you may say at

this point in open court.

MR. MUMMAU: Your Honor, I requested the presence of the Court Reporter. I was not trying to--[at this point Mr. Mummau was cut off by the Court].

THE COURT: I said: What you may choose to say you may say in open court.

MR. MUMMAU: I will do so. I have presented a motion for filing with the Prothonotary. I have brought it to the Court.

THE COURT: Did you ask permission to approach the Bench?

MR. MUMMAU: May I approach the Bench, your Honor?

THE COURT: Stand back where you should ask that question. You went to law school.

MR. MUMMAU: May I approach the Bench, your Honor?

THE COURT: Yes.

MR. MUMMAU: Counsel, do you want to approach the Bench with me?

MS. AUL: Yes.

THE COURT: Approach the Bench.

(Whereupon the following transpired at side bar.)

MR. MUMMAU: I have presented Ms. Aul with a copy of a motion that I have before me. I have docketed this motion in, as well as a letter to the Judicial Review Board, which I have sent in yesterday's mail with a copy of the motion that I am about to present to the Court. And I present it to the Court.

Testimony of Mr. Mummau later in the proceeding:

MR. MUMMAU: Yes. I would state that the affidavit that I presented that the Court referred to I believe is a fair characterization from my perspective. The Court also indicated that I stalked out of the the conference, and I would like to make the record reveal--I would like the record to note that I did not leave the conference until I was referred to in very disrespectful terms by

Defendant's counsel, and that was the cause of my leaving the meeting, and the only cause of my leaving the meeting.

The Court did say in that conference that the Divorce Code provides for my right to take discovery of the Defendant's expectancies. The Court specifically asked the Defendant --

[Mr. Mummau was cut off by the Court]

THE COURT: Mr. Mummau, I did not say that you had the right to do what you choose to do.

Now we are getting into argument. That was a settlement conference.

Rhetorically my questions were asked. Bopth parties were asked what would be needed to resolve the dispute, to move the matter on.

In that context there may have been a statement such as why not give him the expectancies, this reference to expectancies factors contained in the Divorce Code, after which an argument with Miss Gold-Bikin [an attorney who had appeared on that day along with Ms. Aul] who did not agree that there was

any such requirement.

The Court at no time acknowledged, as you set forth in your affidavit, and I will state it again, at no time, acknowledged that the requests, plural, which you have been making or had made for more than two years with respect to discovery of appraisals, never discussed marital property and expectancies as proper legal requests.

If you have nothing further, please step down.

MR. MUMMAU: Your Honor, I would like to respond to that, if I may.

THE COURT: I am not going to argue with you. I made the statement.

There is no record, Mr. Mummau. You have made complaint to the Judicial Inquiry and Review Board.

The matter will be in another forum, so you can step down.

MR. MUMMAU: Before I do so, your Honor --

[Mr. Mummau was again cut off by the Court]

THE COURT: I am not arguing with you on the stand, Mr. Mummau.

MR. MUMMAU: May I ask a question of the Court?

THE COURT: May you what?

MR. MUMMAU: May I ask a question of the Court?

Is the Court instructing me to step down?

THE COURT: Do you have anything else that you wish to add other than an argument that you choose to add about what was or was not said or done in the settlement conference held in my chambers?

We are not going to argue that point.

MR. MUMMAU: I am not interested in arguing, your Honor.

THE COURT: Do you have any other statements to make with reference to this case and this action?

MR. MUMMAU: Well, your Honor, if I make a statement that you--[Mr. Mummau was cut off by the court.]

THE COURT: A statement is one thing. Do you have any other witnesses, any testimony

that you wish to give?

MR. MUMMAU: Yes, there are some other things that I would say, if permitted.

THE COURT: What else do you wish to say?

MR. MUMMAU: I would make some other statements regarding what took place in that conference.

THE COURT: That's an argument.

Do you have anything to add other than the conference?

MR. MUMMAU: I would like to note an objection to the Court's refusal to permit me to make a statement regarding that matter.

That is all I have to say.

THE COURT: Do you have anything to add, Ms. Aul?

MS. AUL: You mean other testimony, your Honor?

THE COURT: Yes.

MS. AUL: No.

[Ms. Aul then proceeded to "testify" but without taking the stand.]

MR. MUMMAU: Your Honor, do I have an opportunity to respond to that or not?

THE COURT: Yes you may respond.

MR. MUMMAU: All right. What I have been trying to deal with throughout this proceeding is the fact that I am being asked to provide information about marital property which is not in my possession, which I have had no custody or control over from the time my wife separated two and a half years ago.

I have requested the Court to give me ab opportunity to have an inventory and appraisal of that made, which would enable me to file an inventory and appraisement.

I have been held in contempt for not filing an inventory and appraisment as to property out of which I have no custody or control and haven't had--[Mr. Mummau was cut off by the Court]

THE COURT: Have you filed an inventory and appraisment of any property, Mr. Mummau?

MR. MUMMAU: No, I have not, but neither has

the Defendant.[--]

MS AUL: Your Honor--

MR. MUMMAU: And the Defendant has had full access to my property where I live. She has been able to come there. She has in fact come there. I was advised recently, not that long ago, that she still has access to get into the house, if she wants to.

And I have never precluded her from having an inventory and appraisal of any marital property.

.....

MS AUL: He [Mr. Mummau] has not filed his income tax returns since I don't know when.

MR. MUMMAU: Your Honor, I object to that. I object to that. They know nothing about that. They have no right to come into court and make an assertion--[cut off by the court]

THE COURT: You hit it right on the nose for the first time.

I hope there was an enlightenment in your

brain. That's the whole problem. They don't know.

MR. MUMMAU: That's not the whole problem.

THE COURT: And why don't they know? Because you won't cooperate.

MR. MUMMAU: That's not true. You're asserting that I won't cooperate. I will cooperate.

This is not a matter of cooperation. It's a matter of raw power.

THE COURT: I guess the light bulb didn't go off. I thought perhaps it did.

MS AUL: In addition--

THE COURT: You don't know whether they filed an income tax?

MR. MUMMAU: I don't know whether she has, your Honor, but I'm not making the statement that she hasn't.

(This is a summary of an advisory of opinion issued by the Pennsylvania Bar Association's Committee on Legal Ethics and Professional Responsibility prepared by Michael A. Bloom, the Committee chairman and published in the "Pennsylvania Lawyer Magazine" as No. 87-20)

OPINION:

A partner in a law firm was consulted by husband with respect to a divorce action but the husband did not retain the partner as counsel. Attorney representing the wife did not learn that the husband had consulted his partner until after the complaint had been filed. While the partners had not discussed the case, the attorney must withdraw his representation of the wife and return a major portion of the fee, unless the attorney obtains a waiver from both the wife and the husband.

(From the November 3, 1987 Deposition of O. Howard Mummau taken in pursuance of his Petition to Disqualify Defendant's Counsel for Violation of The Code of Professional Responsibility)

---

BY MR. SCHANNAUER: (Attorney Representing Attorney Aul:

Q: What is the status of your malpractice action against Judge Hummer?

MR: RUTH: (Representing Mr. Mummau) I think it is fair to say it's my understanding that at some point Mr. Mummau was no longer counsel for the client that the case was brought on behalf of.

And therefore, I don't think he has personal knowledge of what's occurred in that case.

MR. SCHANNAUER: Are you no longer representing the plaintiff in that malpractice action?

MR. MUMMAU: That's correct.

MR. SCHANNAUER: When was the last time you saw the docket concerning the malpractice action?

MR. MUMMAU: I don't know that I ever saw the docket.

MR. SCHANNAUER: Now, you also indicated ---when did you withdraw from the case?

MR. MUMMAU: I don't think that I ever -- I don't know how that was handled to be very honest with you. I don't know what the docket would show on that.

I only know the circumstances that arose regarding that case between myself and other counsel, so I am not sure how counsel handled that aspect of that issue.

MR. SCHANNAUER: Did you file a praecipe withdrawing your appearance?

MR. MUMMAU: I don't recall how that was handled.

MR. SCHANNAUER: Do you know when that was handled?

MR. MUMMAU: No, I don't.

MR. SCHANNAUER: 1985?

MR. MUMMAU: I just simply don't remember. I think other counsel became involved in probably 1985. That would be my recollection.

MR. SCHANNAUER: Do you remember whether that would be early, middle or late 1985?

MR. MUMMAU: I just simply don't remember the date of that. I would be inclined to say that it was -- I would be speculating. I just don't remember the date of that. Because there was time involved. It was difficult to get other counsel involved in that matter because of the fear that other counsel had expressed --

MR. SCHANNAUER: Well, I think you have answered the question that you don't know.

MR. MUMMAU: -- prejudice that might be imposed upon them.